SUPREME COURT OF THE STATE OF NEW YORK **Index No.: 102141/2007**
COUNTY OF RICHMOND DCM PART 3 **Motion No.: 001**

SHAWN O'NEILL,

Plaintiff

against

DECISION & ORDER

HON. JOSEPH J. MALTESE

SOPHIA TSOUKAS,

Defendant

The following items were considered in the review of this motion for summary judgment

Papers	Numbered
Notice of Motion and Affidavits Annexed	**1**
Answering Affidavits	**2**
Replying Affidavits	**3**
Exhibits	**Attached to Papers**

The defendant's motion to dismiss the plaintiff's complaint is granted in its entirety.

This action arises out of an accident that occurred on October 31, 2005 at 717 Rockaway Street, Staten Island, New York. The property is owned by the defendant, and was in the midst of construction at the time of the accident. The plaintiff, a carpenter, alleges to have fallen over a beam during the course of his employment. As a result of the plaintiff's fall, he claims to have suffered serious injuries.

The plaintiff was hired by J&I Contracting Inc. (J&I) a couple of days prior to the accident. The plaintiff had responded to an ad in the *Staten Island Advance* and agreed to meet Jim Carteret, J&I's owner, at the job site for some carpentry work.[1] According to the plaintiff,

[1] Testimony of Shawn O'Neill, March 3, 2008, 19.

Carteret told him that his job would be to follow Carteret's orders.[2] The plaintiff also testified in his deposition:

> Q: Did he [Carteret] say who would be supervising you?
> A: No, he was supervising. The homeowner was on site, and that was it. He [Carteret] is the supervisor.[3]
>
> Q: Did anyone else give you instruction that day before your accident?
> A: No.[4]
>
> Q: Did you meet this person? [defendant's husband]
> A: Did I meet him directly? No
> Q: Did you meet him in any other way?
> A: Had I put stuff in his truck for him; yes. So, I would say I - - I don't know if that's a meeting directly, but remember there was times when he had asked me to put some things in his pickup, and I went ahead and did so.
> Q: So, you had some conversation with him at that point?
> A: Sure, I had, not long conversation, but I had some simple conversation as far as - -.[5]

The plaintiff was getting off a ladder when he stepped into a beam, which he did not know had been cut, and consequently fell over.

> Q: Do you know who, if anyone, told Money to cut this beam?
> A: From what I understood, it was the contractor. Jim told him. That is from I what I understand. I mean, nobody is going to go ahead and just cut a beam unless there's -- somebody tells them, and that somebody has to be Jim.[6]

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[2] *Id.* at 24.

[3] *Id.* at 25.

[4] *Id.* at 57.

[5] *Id.* at 31-32.

[6] *Id.* at 90.

Q: At the time you fell, was this person you are referring to as the homeowner on the site?
A: I don't recall. I think he – I don't know.[7]

Discussion

Summary judgment is appropriate where there are no genuine issues of material fact to be resolved at trial. When appropriate, summary judgment has the additional benefit of expediting all civil cases by eliminating from the trial calendar claims that can be properly resolved as a matter of law.[8] An unfounded reluctance to employ this remedy serves only to swell trial calendars and to deny other litigants the right to have their claims promptly adjudicated.[9]

The defendant moves to dismiss the plaintiff's complaint for alleged violations of the *New York's Labor Law* §§ 200 and 240(1) and for negligence.

New York Labor Law § 200 affords protection to construction site workers who are exposed to the risks of working at elevated heights.[10] The statute was designed to prevent gravity-related accidents by imposing strict liability upon owners, contractors and their agents upon proof that inadequate safety precautions proximately caused the injury.[11] It is well settled that Section 200 imposes a non-delegable duty upon owners and general contractors to furnish, erect, or cause to be furnished or erected, devises to give proper protection and safety to people working upon a building or structure. Furthermore, absolute liability is imposed upon an owner or general contractor for failure to comply with this statute when such failure is a contributing

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[7] *Id.* at 103.

[8] *Andre v. Pomeroy*, 35 NY2d 361, 362 NYS2d 131 [1974].

[9] *Gibbons v. Hantman*, 58 AD2d 108, 395 NYS2d 482, aff'd 43 NY2d 941, 403 NYS2d 895 [1978].

[10] *Blake v. Neighborhood Housing Services of New York City, Inc.,* 1 NY3d 280 [2003].

[11] *Rocovich v. Consolidated Edison Co.,* 78 NY2d 509 [1991].

factor to the accident.[12] Actual or constructive notice on the part of the owner or general contractor is not required to impose liability.[13] Liability is imposed regardless of the degree of control over the work performed,[14] and regardless of the injured party's own comparative negligence or assumption of risk.[15]

Albeit the general duties of contractors and owners, *New York Labor Law* § 240(1) exempts from liability owners of one- or two-family dwellings unless they directed or controlled the work being performed.[16] The phrase "direct or control" is "construed strictly and refers to the situation where the owner supervises the method and manner of the work."[17] The purpose of this provision is to remove "the burden of strict liability from such owners when they have nothing whatsoever to do with the carrying out of the work."[18]

The plaintiff cites *Rimoldi v. Schanzer* where the Appellate Division, Second Department denied the defendants' motion for dismissal of a complaint based on New York's Labor Laws. In determining its conclusion, the Court noted that the defendants exercised a great degree of control over the construction of a pool. The defendants made decisions in regards to location, shape and size of the pool, and alternative methods of construction in order to comply with statutory requirements. In addition, a defendant indicated that he was the builder and supervisor in the construction when he filled out a building permit. Altogether, these facts raised an issue of fact as to whether the defendants had sufficient direction and control over the construction.

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[12] *Zimmer v. Chemung County Performing Arts. Inc.* 65 NY2d 513 [1985].

[13] *Miller v. Perillo* 1 AD2d 389 [1st Dept 1979].

[14] *Haimes v. New York Telephone,* 46 NY2d 132 [1978].

[15] *Zimmer v. Chemung County Performing Arts,* supra.

[16] *McGlone v. Johnson*, 27 AD3d 702 [2d Dept 2006].

[17] *Rimoldi v. Shanzer*, 147 AD2d 541 [1989].

[18] *Id., citing* 1980 NY Legis Ann, at 266.

The *Rimoldi* facts are remarkably different from the instant case. There is no evidence that the defendant nor her husband directed the plaintiff's work. The plaintiff's own deposition reveals that he was only to follow Carteret's orders. Neither the occasional presence of the defendant's husband or the fact that the plaintiff helped him in carrying materials to his truck raise an issue as to a potential supervisory role. Furthermore, neither defendant or her husband ordered the beam to be cut, hence not causing the condition that caused the plaintiff's injury. The plaintiff's own examination before trial confirms that Carperet was his supervisor and the plaintiff was only to follow Carberet's orders.

The case at bar also differs from *Garcia v. Martin* where the plaintiff attested that the defendant gave him specific instructions on the tasks to be performed. Moreover, it was defendant's demand that the plaintiff go up to the roof that actually and proximately caused the plaintiff's fall.[19] No facts in this case resemble the *Garcia* scenario. The plaintiff admitted that he was only to follow Carberet and that he did not know whether the defendant's husband was in the property at the time of the accident. Neither did the defendant or her husband order the beam to be cut, hence not creating the condition that caused the plaintiff's injury. A defendant makes a prima facie showing that he is entitled to the homeowner's exemption by "submitting evidence demonstrating that they did not participate in the supervision or control of the plaintiff's work."[20] The defendant has successfully introduced evidence that denies any supervision or control over the plaintiff. In his opposition papers, the plaintiff fails to provide any evidence to raise a triable issue of fact. In light of the foregoing, the defendant is entitled to summary judgment dismissing the plaintiff's complaint.

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[19] *Garcia v. Martin*, 285 AD2d 391 [1st Dept].

[20] *Id.*

Accordingly, it is hereby:

ORDERED, that the defendant's motion to dismiss the plaintiff's complaint is granted.

ENTER,

DATED: March 11, 2009

Joseph J. Maltese
Justice of the Supreme Court